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Death Penalty Barred in Spy Case

In Unusual Move, Appeals Court Steps In Before a Trial

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—In an unusual action, a federal appeals court intervened Tuesday in the impending trial of James D. Harper, ruling that the accused spy could not be sentenced to death if convicted of espionage for allegedly selling defense secrets to the Soviet bloc.

A three-judge panel of the U.S. 9th Circuit Court of Appeals, overturning a finding by the trial judge, held unanimously that the death penalty provision of the Espionage Act had been rendered unconstitutional by long-standing rulings of the U.S. Supreme Court.

The appeals panel said U.S. District Judge Samuel Conti "clearly erred" in finding that Harper could be executed if convicted. Conti was wrong in holding that he as judge could formulate the sentencing guidelines the high court held were necessary in deciding whether to impose capital punishment, the panel said.

"... Whether the sentencing authority is the judge or the jury, the guidelines must come from Congress, not from the courts," Justice Stephen R. Reinhardt wrote in an opinion joined by Justices Joseph T. Sneed and Betty Binns Fletcher. A judge's own guidelines for himself would "be no limitation at all," the panel said.

The court noted that both defense and

government attorneys had agreed in hearings before Conti that the death penalty could not be legally imposed under current law. The U.S. Senate recently passed a bill, supported by the Justice Department, that would restore capital punishment for certain federal crimes, including espionage.

Later in the day, Conti vacated his ruling, citing the appellate court decision. The judge, apparently dismayed by the government's refusal to support his finding before the panel, observed: "My rationale (for the ruling) got lost somewhere along the line, I'm afraid."

Harper's attorney, Jerrold M. Ladar of San Francisco, said the appellate court's decision "removed the impediment" to plea negotiations that could resolve the case before the scheduled start of the trial on April 24. Ladar said his client was "greatly relieved" by the ruling.

The defendant now faces a maximum sentence of life in prison if convicted, but a lesser sentence could be imposed in the event of a plea bargain.

Harper, 49, a Mountain View engineer, was charged with selling ballistic-missile defense secrets to the Polish government for \$250,000. FBI investigators said the information was turned over to the Soviet Union.

In pretrial hearings, Conti took a stand on the death penalty that sharply conflicted with a widely held view among authorities that Supreme Court rulings in 1972 and 1976 had effectively invalidated the death penalty for espionage. The executions of Julius and Ethel Rosenberg in 1953 marked the only time capital punishment for espionage had been imposed in peacetime.

Conti found that an execution for acts of spying was not "uniformly disproportionate" to the severity of the offense. He acknowledged that the high court now requires sentencing guidelines to minimize the risk of arbitrary imposition of the death penalty. However, he as judge could devise valid guidelines, he said.

Ladar asked the federal appeals court to intervene to overturn the finding. Government attorneys argued that the court should wait to rule on the issue if and when Harper was convicted and actually received the death penalty. However, under questioning from the panel, Assistant U.S. Atty. John C. Gibbons declined to support Conti's view of the law.

The appeals panel conceded it was unusual to step in before trial. However, such intervention was necessary, it said, because of the importance of the issue to both Harper and the government. Further, it noted, the constitutionality of the death penalty provision for espionage had never before been raised squarely in court.

Conti's order approving capital punishment would impose "truly a substantial hardship" on Harper, the panel said.

"The specter of the death penalty would be likely to influence many tactical decisions he would make during his trial," Reinhardt wrote. "It might well lead him to take fewer chances in his defense... (and) it might also lead (Harper) to forgo his constitutional right to a trial altogether."

"Negotiating a plea agreement for a prison sentence would, if the court accepted

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